2016 IL App (1st) 122607-U
No. 1-12-2607

THIRD DIVISION
November 16, 2016

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KRIS DANIEL and MARK DANIEL, Independent Co-Executors of the Estate of Benjamin S. Daniel, Deceased,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellees and Cross-Appellants,	)	No. 07 CH 1061
v.	)	
DONALD P. RIPOLI, V. JAMES GRIECO, ARNOLD N. SCHORN AND COMPANY, an Illinois Partnership and ARNOLD N. SCHORN AND COMPANY, LLC, an Illinois Limited Liability Company,	)	The Honorable Rita M. Novak, Judge Presiding.
Defendants-Appellants and Cross-Appellees.	)	

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Lavin and Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in determining that the January 14, 2004 agreement changed the decedent member's participating percentage in the LLC for only the years 2003 and 2004. The Illinois Limited Liability Company Act is clear regarding the requirements for an effective conversion to an LLC, which were met in this case, and that individual LLC members have no personal liability. The estate is not entitled to post-death distributions, as an addendum signed October 6, 1999 to the operating agreement provided that no post-death distributions would be

paid unless a loan taken by decedent and another LLC member was repaid, and there was insufficient evidence that this loan was in fact repaid.

¶ 2 On January 28, 2015, this court entered an Opinion. On February 17, 2015 a Petition for Rehearing was filed which questioned our jurisdiction citing *Huber v. American Accounting*, 2014 IL 117293. On rehearing we withdrew our Opinion and issued a Rule 23 Order finding that we did not have jurisdiction over the appeal and dismissed it, and, regarding the cross appeal, affirmed the portions of the trial court's order finding that defendants Ripoli and Grieco have no individual liability and denying the estate distributions on death. We also remanded for an appropriate order regarding the money held in the Insurance Trust. On March 13, 2016 the Supreme Court entered the following supervisory order: "On the exercise of this Court's supervisory authority, the Appellate Court, First District, is directed to vacate its order in *Daniel v. Ripoli,* case No. 1-12-2607 (12/23/15). The appellate court is instructed to consider the appeal of Arnold N. Schorn & Company, LLC on its merits."

¶ 3 Pursuant to the supervisory order we now consider the case on its merits as presented in the original briefs, the petition for rehearing, and the response and reply thereto.

¶ 4 We are asked by the defendants to decide if the document signed January 14, 2004 titled "Points for Agreement – Members of the LLC- Changes to Operating Agreement Signed in 1999" ("the January 14, 2004 agreement") was effective for 2004 only or if it was effective for 2005 and 2006 as well; and whether the court's damages award was unsupported by the evidence. The estate cross appeals and asks us to decide if the trial court erred in: 1) finding Ripoli and Grieco had no personal liability: and 2) denying that portion of the estate's motion to modify the judgment entered on February 2, 2012, seeking an increase in the amount of the judgment by the amount of distribution on death proceeds and insurance.

¶ 5 This action was brought by the estate of a deceased member of the defendant limited liability company (LLC) to recover the amount of LLC distributions allegedly due to the decedent. The trial court found that the January 14, 2004 agreement did not effect a permanent change for the member's participating percentages and that, after the years specified in that document, specifically, 2003 and 2004, the decedent was entitled to the amount of his original participating percentage, which was awarded to the estate. The court entered judgment against the LLC only and held that the individual LLC members had no personal liability.

¶ 6 We hold that the trial court erred in determining that the January 14, 2004 agreement changed the decedent member's participating percentage in the LLC for only the years 2003 and 2004.

¶ 7 As to the estate's cross-appeal, we hold that the Illinois Limited Liability Company Act (805 ILCS 180/1-1 *et seq*. (West 1998)) is clear regarding the requirements for an effective conversion to an LLC, which were met in this case, and that individual LLC members have no personal liability. The estate did not provide any support for its contention that an estate could bring suit against the individual LLC members, thereby forfeiting this argument. Also, the estate is not entitled to post-death distributions, as an addendum signed October 6, 1999 to the operating agreement provided that no post-death distributions would be paid unless a loan taken by decedent and another LLC member was repaid, and there was insufficient evidence that this loan was in fact repaid. We therefore affirm these portions of the court's order finding that defendants Donald Ripoli and James Grieco have no individual liability and denying the estate distributions on death.

¶ 8 Standard of Review

¶ 9 The defendants urge us to use a *de novo* standard of review because the trial court considered only the contract in question, that is the January 14, 2004 agreement which changed the LLC Operating Agreement, in reaching its conclusion. The estate urges a manifest weight of the evidence standard because the defendants presented extrinsic evidence testimonial and documentary evidence as to the parties' intent and conduct.

¶ 10 While the trial court heard the testimonial evidence and reviewed documentary evidence it is clear that the court's decision was based entirely and only on the language of the actual document in question and its reading of that document. Therefore we agree with the defendants that the correct standard of review is *de novo*.

¶ 11 BACKGROUND

¶ 12 We summarize only the facts necessary to a resolution of the limited grounds of the appeal and cross-appeal.

¶ 13 Beginning in December 1976, defendant Donald Ripoli and plaintiffs' decedent Benjamin Daniel were partners in the public accounting firm of Arnold N. Schorn & Co., an Illinois general partnership. On December 31, 1998, Ripoli and Daniel filed articles of organization and a statement of conversion with the Illinois Secretary of State, which converted the Arnold N. Schorn & Co. partnership into a limited liability company called Arnold N. Schorn & Co. LLC. The statement of conversion stated that "[e]ach partner voted for the conversion." The articles became effective on January 1, 1999.

¶ 14 On June 1, 1999 defendant James Grieco became a member of the LLC, and the members entered into an operating agreement providing that the members' participating percentage of profit allocation would be as follows if the LLC's profit was $600,000 or less: 36.5% to Grieco; 36.5% to Ripoli; and 27% to Daniel. Under the operating agreement, Daniel, Ripoli, and Grieco

"approved and ratified" the articles of organization and agreed to operate the business under the Illinois Limited Liability Company Act (805 ILCS 180/1-1 *et seq*. (West 1998)) and the operating agreement. The operating agreement further provided that "the rights[,] duties and liabilities of the members shall be those provided in the Act as amended from time to time."

¶ 15 Because the estate relies in part on the original partnership agreement, and the partnership's "Buy-Sell" amendment it is necessary to briefly discuss them. The original partnership agreement was amended with a "Buy-Sell Agreement" signed by Daniel and Ripoli on December 31, 1976. Its stated purpose was the "arrange for the sale to the partnership of the partnership interest of the partner first to die *** to avoid the forced liquidation of the partnership business upon the death of a partner and to obtain for the estate of a deceased partner the maximum value of his interest in the partnership." This Buy-Sell Agreement provided that after the death of either Daniel or Ripoli the surviving partner would buy out their interest in the partnership and included the formula for pricing the buy-out. It set up a trust to "provide the funds needed to acquire the interest of a deceased partner through the purchase of life insurance on the lives of the partners. Each partner started with a $50,000 life insurance policy and agreed that the "Partnership shall be the sole owner of the policies" and that the partnership was "to pay all premiums due on the policies." A Trustee was named as the beneficiary, "to hold the policies and all proceeds received thereunder in trust for the purposes of [the] agreement." The agreement continued: "The proceeds of the insurance policy or policies on the life of the deceased partner shall be used by the trustee on behalf of the partnership in making payment of the purchase price of the deceased partner's interest in the partnership." Also included was the formula to establish the purchase price of the deceased partner's interest in the partnership, and which stated that the partnership could keep any insurance proceeds that exceeded the purchase

price. The Partnership Agreement was later amended by an addendum "to conserve and maintain an adequate partnership working capital" which required that the expenses of business development were expected of both partners and would be unreimbursed and was signed by Daniel and Ripoli on January 1, 1994. Neither the Buy-Sell Agreement nor its addendum is part of the LLC Operating Agreement.

¶ 16 In contrast, The LLC operating agreement at Section 8.1 provided that "any capital deficit must be eliminated within 60 days of when the deficit occurs." And, further, that "the capital account [of a deceased member] would be paid over to the member or his estate within six months of the Member's death***as determined under this Agreement in full satisfaction of the Member's distributional interest in the Company (except for amounts that may be payable under Article IX)."

¶ 17 In what the defendants call a "buy-out" agreement, Section 9.5 of the LLC's operating agreement set forth a formula for "Distributions upon Death.

¶ 18 We note that while the partnership's Buy-Sell agreement called for the partnership to pay the insurance premiums, the LLC Operating Agreement indicates that insurance premiums would be paid by the deceased member. The estate in its brief claims both that Daniel paid the premiums from 1976 and that the "Partnership ***continued to pay premiums on the lives of Mr. Daniel and Mr. Ripoli" but the record is unclear about who paid the premiums on these insurance policies. The court order entered February 2, 2012 concluded that regarding the insurance policies, the estate had not provided reliable evidence on the insurance proceeds or payment so the court's award did not take them into account.

¶ 19 The LLC operating agreement, at Section 20.2 also permitted amendment by majority approval but required consent of the affected member if the amendment would reduce the participating percentage of that member other than on a *pro rata* basis.

¶ 20 On October 6, 1999, Ripoli and Daniel entered into an "Addendum to Operating Agreement" of the LLC in which they agreed that the "provisions for distributions upon death as listed under Section 9.5 [of the LLC Operating Agreement] do not apply to Benjamin S. Daniel and Donald P. Ripoli ****All collections received from life insurance and the deceased partner's share of accounts receivable (former and present firm) will be applied to the repayment of the bank loan from the American National Bank incurred prior to the merger at June 1, 1999. Each former partner – Benjamin S. Daniel and Donald P. Ripoli has assumed the legal obligation of repayment of the loan at 50% of the loan to each former partner. After each former partner and now member's estate has finally paid its share (50%) of the bank loan, Section 9.5 will apply as to any remaining collections on outstanding receivables at the date of death and current collections from the deceased Member's Clients." The American National Bank loan (used to finance the purchase of Arnold Schorn & Company in December, 1976) was apparently later replaced with a loan for $57,000 (September 12, 2003) which was itself later replaced with a loan from Bank One, for $35,000 (dated September 23, 2004 but effective October 31, 2004).The evidence did not establish whether any of these loans were ever paid off. Grieco did not sign any of the loans or this addendum.

¶ 21 On November 3, 2003, the three members met to discuss a disparity between Daniel's participating percentage and the actual income generated from Daniel's clients. As the Daniel estate's expert testified, from 2000 to 2003 Daniel was given credit for contributing 27%, but his clients paid the LLC only 17%. As a result, Daniel had a negative capital account with the firm.

A "capital account" is an accounting term. A capital account represents an accumulation of each member's contributions minus the member's distributions from all prior years and reflects the corresponding amount due between members, if distributions exceed contributions. At trial, Ripoli explained that a capital account is "the difference between *** the earnings of each individual member minus the draws of each individual member."

¶ 22 The minutes from the meeting of November 3, 2003 reveal that Ripoli's book of business was on target with his participating percentage, at approximately 35.85%. However, Grieco's book of business in 2003 accounted for approximately 50% of the LLC's income, whereas his participating percentage under the operating agreement was set at 36.5%. Daniel's book of business in 2003 amounted to only 13.5% of the LLC's income, while his participating percentage under the operating agreement was 27%. The minutes also reflect that Daniel's capital account was negative ($79,379).

¶ 23 Daniel's negative capital account and the disparity between Grieco's and Daniel's contributions in the form of client payments and what each was credited and distributed under the operating agreement created tremendous friction between the partners and threatened to lead to the dissolution of the LLC. The minutes of the members' November 3, 2003 meeting state: "Current ratios will not allow the firm to continue. A disproportionate <u>share of income</u> and <u>draws</u> are directed to Ben Daniel." (Emphases in original.)

¶ 24 On November 24, 2003 the members met again to continue discussing this disparity and discussed various proposals to correct it. The minutes of this meeting indicate that the first option discussed was termination of the firm as of October 31, 2003. The members decided against this option, however, because at the time the firm liabilities exceeded its assets. The second option

discussed was that Daniel's clients would remain with the firm but Daniel would "retire" and he would be paid for those clients on a "fee per hour basis."

¶ 25 Under the third option, which is the option the members ultimately agreed on, the LLC would continue with Daniel as an active member but with adjustments made to his draws. Specifically, the first $100,000 of Daniel's clients' cash payments to the firm would be used to pay Daniel's share of expenses. In the event that Daniel's clients paid more than $100,000 he would then receive a draw limited to a maximum of $5,500 per month or $66,000 annually. If Daniel's clients paid more than $166,000, any difference would be paid to the firm as a reduction of Daniel's negative capital account. The firm would provide Daniel with health and life insurance as a firm expense, with the firm designated as the beneficiary of the life insurance policy. Again, it is unclear from the record if there were any life insurance policies paid for by Daniel. Daniel would also be required to sign a promissory note for his negative capital account.

¶ 26 On December 8, 2003, all three members, including Daniel, signed an agreement which changed the LLC Operating Agreement for the year 2003. The agreement provided as follows:

> "THE UNDERSIGNED, MEMBERS OF ARNOLD N. SCHORN & CO., LLC, HEREBY AGREE THAT THE PROFIT ALLOCATION AMONG MEMBERS AS REFLECTED IN THE AGREEMENT SIGNED BY THE MEMBERS IN 1999, WILL NOT APPLY TO THE YEAR 2003.
>
> FOR THE YEAR 2003, THE PROFIT ALLOCATION TO BE USED FOR MEMBERS WILL BE DETERMINED UPON REVIEW OF ARNOLD N. SCHORN & CO., LLC FINANCIAL STATEMENTS FOR THE YEAR ENDED DECEMBER 31, 2003."

¶ 27 Clearly the December 8, 2003 agreement would rely on numbers to be determined at year end, or a few weeks away from the date it was signed.

¶ 28 On January 14, 2004, all three members, including Daniel, signed another document titled, "POINTS FOR AGREEMENT–MEMBERS OF LLC–CHANGES TO OPERATING AGREEMENT SIGNED IN 1999." The members agreed to change their capital accounts as of December 2003 to reflect the actual percentages of what each member's clients cash receipts were, minus each member's actual distributions. The agreement provided for an adjustment to each member's capital account beginning in 2003 based on the member's actual income to the firm minus his actual distributions from all prior years, referred to by defendants as a "running scoreboard" concept.

¶ 29 Paragraph 1 stated the general terms or starting point of the agreement:

> "1. CAPITAL ACCOUNTS TO BE RESTATED AS OF 1/1/03 BASED UPON A RATION OF CASH RECEIPTS PER PARTNER CLIENTS TO TOTAL CASH RECEIPTS APPLIED TO NET INCOME FOR THE YEAR…..IT IS AGREED CAPITAL ACCOUNT BALANCES AT 1/1/03 WILL BE AS FOLLOWS:
>
> CAPITAL BSD (Daniels) $160,121
>
> CAPITAL VJG (Grieco) $ 9,537
>
> CAPITAL DPR (Ripoli) $ 43,112
>
> $(107,472)"

¶ 30 Paragraphs 2, 3 and 4 addressed the methodology for calculating Daniel's future draws starting with 2003 and 2004.

¶ 31 Paragraph 2 of the January 14, 2004 agreement identified the percentage of actual cash receipts each member's clients paid to the firm in 2003 and allocated profit and loss accordingly for 2003. Specifically the new allocations for 2003 were:

"PROFIT AND LOSS ALLOCATIONS FOR YEAR 2003 BASED UPON COLLECTIONS FROM EACH MEMBER CLIENTS:

BSD 13.28%

VJG 50.42%

DPR 36.30%"

¶ 32 Paragraph 3 defined the calculation for Daniel's draw for 2004.

"3. FOR YEAR 2004 – DRAWS FOR BSD [Daniel] LIMITED TO EXCESS OF CASH RECEIPTS FROM BSD MEMBER CLIENTS LESS $100,000. MAXIMUM DRAW DISTRIBUTION IN ANY MONTH LIMITED TO $5,500. IF DRAW SHOULD BE LARGER THAN $66,000 ($5,500 X 12 months) EXCESS TO REDUCE NEGATIVE CAPITAL ACCOUNT. IF COLLECTIONS DO NOT WARRANT A $66,000 DRAW, $5,500 WILL BE REDUCED ACCORDINGLY. HEALTH AND DENTAL INSURANCE, AICPA LIFE INSURANCE AND $50,000 INSURANCE ON LIFE OF BSD [Daniel] WITH FIRM AS BENEFICIARY, WILL BE CONSTRUED AS OPERATING EXPENSES FOR THIS COMPUTATION. INCOME ALLOCATION WILL BE BASED UPON CASH RECEIPTS FROM MEMBER CLIENTS TO TOTAL CASH RECEIPTS FROM MEMBER CLIENTS."

¶ 33 Paragraph 4 elaborates on Paragraph 3 and includes a "carry-over."

"4. E.G. MONTHLY CONTRIBUTORY EXPENSES $8,333. THIS IS CARRIED OVER MONTH TO MONTH MINIMUM CASH REQUIREMENT FOR DRAW TO

BE PAID $8,222 X # OF MONTHS – CASH RECEIPTS TO DATE. COLLECTIONS IN ANY ONE MONTH ARE FIRST APPLIED TO THE $8,333 REQUIRED CONTRIBUTION. DRAW OF UP TO $5,500 CAN THEN BE TAKEN IF TOTAL RECEIPTS ALLOW.

IF AMOUNT COLLECTED IS LESS THAN $8,333 LESS AMOUNT COLLECTED IS CARRIED OVER TO THE FOLLOWING MONTH. NO DRAW WILL BE TAKEN FOR THAT MONTH IN THE SUBSEQUENT MONTH THE $8,333 PLUS CARRIED OVER AMOUNT NEEDS TO BE COLLECTED BEFORE A DRAW IS PAID."

¶ 34 The result of the January 14, 2004 agreement was that Daniel began receiving a substantially reduced distribution. The total distribution to Daniel in 2003 was $210,806. Beginning in January 2004, Daniel received only $500 per month in draws, plus the payment of his health insurance benefits. His total distribution for 2004 was $38,448. Using the formula established in the January 14, 2004 agreement, Daniel's participating percentage in the LLC was reduced to 9.3% in 2004, 7.95% in 2005, and 0% in 2006. Daniel accepted payment based on these reduced distributions.

¶ 35 In November 2004, Daniel wrote a memo to Ripoli and Grieco to "discuss the compensation policy for Ben Daniel (year 2004) and to discuss what is fair for all concerned." Apparently ignoring the plain language in Paragraph 3 and 4 of the January 14, 2004 agreement which changed the operating agreement, Daniel asserted that the December 8, 2003 agreement was signed regarding "compensation by the partners for 2003 only" and that "nothing has been signed for 2004." Daniel wrote that he wanted $1,000 per month for living expenses and payment for his estimated taxes and health insurance. Daniel wrote in his memo: "The difference

between my share of gross collections and the net to me above will be kept by the firm to reduce my deficit in my capital account." There was no meeting concerning his December 8, 2003 memo, and no other members agreed to his suggested changes. Daniel continued to receive and accept reduced distributions under the reduced participating percentage and Daniel did not challenge the formula established in the January 14, 2004 agreement.

¶ 36 The LLC members all abided by the terms of the January 14, 2004 agreement. Daniel passed away on July 12, 2006.

¶ 37 After Daniel's death, his estate brought this action in a four-count verified complaint against Ripoli, Grieco, the Arnold N. Schorn & Co. partnership, and Arnold Schorn & Co LLC, seeking the amount the estate claimed was owed to Daniel under the amended terms of the operating agreement. Count I alleged breach of contract by Ripoli and the partnership for breach of the original partnership's Buy-Sell agreement and asserted, as a factual predicate to this claim; that the conversion from a partnership to an LLC failed. Count II sought a declaratory judgment that under the December 8, 2003 agreement and the January 14, 2004 agreement Daniel's participating percentage in the LLC was 27%, the original participating percentage, for the years 2004, 2005, and 2006 and that an unlawful diminution of his participating percentage had occurred. Count III sought rescission of the January 14, 2004 agreement based on Grieco's and Ripoli's alleged breach of fiduciary duty to Daniel. Count IV sought an accounting.

¶ 38 Defendants filed a two-count counterclaim. Count I sought damages for an account stated for Daniel's negative account to recover all amounts Daniel allegedly owed. Count II was brought by Ripoli, individually, to recover $1,870.38 he allegedly personally paid as the premiums due on the life insurance policy purchased by the LLC and the balance due on a loan he and Daniel had co-signed dated September 23, 2004.

¶ 39 On March 26, 2009, the Daniel estate field a verified first amended complaint, which alleged the same four original counts, and added two more counts. Count V sought a declaratory judgment that the January 14, 2004 agreement was unenforceable for lack of consideration. As an alternative to count V, count VI sought a declaratory judgment regarding some of the terms used in the January 14, 2004 agreement.

¶ 40 After discovery, the parties filed cross-motions for summary judgment. The estate filed a motion for summary judgment on counts I and V and sought a declaration under count II that Daniel's participating percentage was 27% (the original operating agreement percentage) for the years 2004, 2005, and 2006. Defendants filed a motion for summary judgment in their favor on count III.

¶ 41 The court granted the estate's motion for summary determination finding that the January 14, 2004 agreement did not refer to 2005 or 2006. The court denied the estate's motion for summary judgment on counts I and V.

¶ 42 The court granted defendants' motion for summary judgment on count III (breach of fiduciary duty), finding that the Daniel estate's assertion of the Dead-Man's Act (735 ILCS 5/8-201 (West 2010)) rendered them unable to prove that Grieco and Ripoli breached their fiduciary duty to Daniel.

¶ 43 Regarding count I, the court solicited briefing from the parties and the estate filed a "Motion for the Declaration of the Consequences from the Faulty Conversion." The court denied the estate's motion, finding that, notwithstanding the confusing manner in which the LLC members maintained certain partnership documents, LLC documents and tax returns, the LLC conversion occurred as a matter of law under section 37-10 of the Limited Liability Company Act. See 805 ILCS 180/37-10 (West 2010).

¶ 44 The estate then filed an amended complaint asserting the same six counts, which defendants answered.

¶ 45 The court held a bench trial from June 20-22, 2011. The estate relied only on stipulated LLC documents and tax returns and the testimony of its expert, Mike Ryan, ("Ryan") a certified public accountant ("CPA"). The LLC did not present expert testimony.

¶ 46 Ryan defined a capital account as "an accumulation of contributions to a partnership plus or minus income or losses for the year based on whatever per cent is in [the] agreement *** so it's a accumulation of all prior years pluses and minuses, and it's an amount that's either due to or from a partner." He agreed that a capital account is an "accumulated score card."

¶ 47 Ryan's testimony was based on a report dated August 25, 2010, which he prepared at the request of Dennis Sassan, the attorney for the estate, and which was introduced into evidence. His report was based on his review of the general ledgers and tax returns for Arnold Schorn & Co. and Arnold Schorn & Company, LLC. In his report Ryan states that "You [Sassan] have requested by opinion as to the capital account balances for Benjamin Daniel's interest in two entities, Arnold N. Schorn & Company [the partnership] and Arnold N. Schorn & Company LLC as of the date of death of Mr. Daniel. In addition, you have asked for my opinion as to the amount required to be paid by each of the entities as required by certain agreements and documents. Finally to list the factors I believe substantiate that there are two entities still in existence."

¶ 48 Ryan's report continued: "In my opinion, Benjamin Daniel's capital account at July 12, 2006 for Arnold N. Schorn & Company was $58,343. His capital account for Arnold N. Schorn & Company LLC at July 31, 2006 was $84,322." He continued: "If it is determined that there was a conversion of the partnership into a new LLC as of January 1, 1999, then Mr. Daniel's

capital account would have been $142,967[1]. Adding the "life insurance proceeds" ($50,000) and subtracting one-half of the balance due on the loan ($1,458.00) Ryan brought his estimate of the total due to Daniel to $191,509.00 if the January 14, 2004 agreement was enforceable but only for 2003 and 2004. Ryan took the position that both entities remained in existence. He based his opinion on the activities which he believed indicated the members' intention to maintain two separate entities, including separate books and records, separate bank accounts, separate income tax returns and intercompany transactions.

¶ 49 His report continued: "In the event the January 14, 2004 document is invalid or unenforceable, then the capital account balances for the LLC and Combined Partnership and LLC would be increased by $154,809, resulting in a capital account of $239,131 for the LLC and 297,776 for the combined entity." He indicated that his calculations were based on the 27% participating percentage in the original LLC operating agreement.

¶ 50 Ryan's report included a calculation of Daniel's capital account for the LLC only, at the 27% participating percentage, as of January 1, 2003 as negative ($160,121) and applying the January 14, 2004 agreement.

¶ 51 His report also included a calculation of Daniel's capital account if the partnership was converted to the LLC on January 1, 1999, using 27% participating percentage for years 1999, 2000, 2001, and 2002, but 13.28% for 2003 in accordance with the January 14, 2004 document to negative ($134,664).

¶ 52 Ryan acknowledged in his report that "the combination of these two entities created accounting difficulties and inconsistencies," a statement that is borne out by his later testimony.

[1] We note that adding $58,343 + $84,322 = $142,665. There is no explanation for the $302 difference, however, as will be seen there is no need to correct any math calculations so we will continue to use Ryan's figures as they appear in the record.

Due to the nature of testimony under direct and cross examination Ryan's actual testimony was complicated by hypotheticals based on a number of variables.

¶ 53 In his testimony Ryan opined that there were two entities existing at the time of Daniel's death, a partnership and an LLC. To further complicate things, Ryan's testimony described several different alternatives: Daniel's capital account if the January 14, 2004 agreement was totally unenforceable, that is, if Daniel's participating percentage remained at 27% throughout his association with the firm; Daniel's capital account if the January 14, 2004 agreement was enforceable but only for 2004; and Daniel's capital account if the January 14, 2004 agreement was enforceable for the years 2004, 2005 and 2006.

¶ 54 For the year 2000 Ryan testified that the firm's gross income was $1,299,181, of which Daniel's clients paid $228,015 or 17% of the gross, that the firm's net was $422,877 and that Daniel's actual distribution was $113, 473, or 27%, but at $17% it would have been $71,889.

¶ 55 For the year 2001 Ryan testified that the firm's gross income was $1,253,383, and that Daniel's clients paid $223,225 or 17%. Although Daniels' distribution at 27% should have been $118,764, his actual distribution was $149,753. Further, that at 17% his distribution would have been $75,234.

¶ 56 For the year 2002 Ryan testified that the LLC's gross income was $1,393,469, of which Daniel's clients paid $282,670 or 20%; that Daniel's actual distribution in 2002 was $104,525; that 20% would have been $106,968, and at 27% it would have been $144,756.

¶ 57 Ryan testified that for the years 2000, 2001 and 2002 Daniel's received $165,715 in excess of what his clients brought in.

¶ 58 For the year 2003 Ryan testified that the LLC's gross income was $1,297,943, of which Daniel's clients paid $172,330 or 13.28%. The net income that year was $539,853, and that at

13.28% of the net Daniel's distribution would have been $71,693, that Daniel's distribution in 2003 was actually $210,806 and that as of December 31, 2003 Daniel had a negative capital account of ($218,492), taking into consideration the January 14, 2004 adjustment of $80,000 and assuming that the January 14, 2004 agreement "was enforceable."[2]

¶ 59 For the year 2004, Ryan testified that the LLC's gross income was $1,263,575, that Daniel's clients paid $117,340 or 9.28%, that the net was $545,465 and that 27% of the net would have been $141,606 but that 9.3% of the net would have been $48,775. He also testified that Daniel's capital account was negative $(208,165) on December 31, 2004. His testimony regarding 2004 does not appear to include what amount was actually distributed to Daniel for 2004.

¶ 60 For the year 2005, Ryan testified that Daniel's capital account in the LLC was negative ($182,403) or negative ($129,020) under the two entity assumption.

¶ 61 Ryan testified that if the January 14, 2004 agreement was "enforceable" and effected a permanent change to a reduced participation percentage then Daniel's capital account would be negative ($218,491).

¶ 62 Ryan testified that, based on his two entity assumption, if the court found the January 14, 2004 agreement was "unenforceable," Daniel would be entitled to 27% of the firm's revenue under the original operating agreement, regardless of what his clients actually paid the firm for the years 2004, 2005, and 2006, or a capital account of $239,131 for the partnership and $297,776 for the LLC.

¶ 63 Ryan testified that if the partnership was converted into an LLC, and if the January 14, 2004 agreement was effective only through 2004, under the original participating percentages of

[2] The record does not include a calculation for 27% of $539,853 which would be $145,760.

the LLC for the years 2005 and 2006 Daniel's capital account at the time of his death would have been positive in the amount of $142,967 and that this would have been the amount owed to Daniel.

¶ 64 Ryan testified that for the full 12 months of 2006 he did not know what Daniel's clients actually paid the firm. Daniel died in July of 2006. He testified that through July of 2006 the firm took in $748,818 gross and that the net was $336,043. He also testified that for that period of time Daniel's clients paid $44,180, or 6%, and that if Daniel was entitled to 6% of the net then he would be entitled to $20,163. He testified that Daniel's actual distribution in 2006 was $7,421.

¶ 65 Ryan testified that if the court found that the January 14, 2004 document was effective and realigned the participating percentages according to the income brought in by each partner for the years 2003 through 2006 that at the end of the period to July, 2006 Daniel would have a negative capital account of ($161,661) in the LLC.

¶ 66 He testified that if the court found that the two entities did not merge that Daniel and the percentages stayed at 27% after 2004 then Daniels would have a positive capital account of $58,646.

¶ 67 Ryan testified that if the court found that the partnership converted to the LLC and that the January 14, 2004 agreement permanently changed the members' participating percentages to reflect what their clients actually paid to the LLC, Daniel would have a negative capital account and would owe the LLC $(110,515.)

¶ 68 Ryan's expert report was entered into evidence. The LLC did not enter any expert report, but relied on stipulated financial documents including tax returns.

¶ 69 Defendants moved for a directed finding on counts II, IV, and V at the close of plaintiffs' case, which the court took under advisement.

¶ 70 Defendants then offered the testimony of Nancy Ciolino, Ripoli (via evidence deposition), and Grieco. Ciolino testified that she was hired by the Arnold N. Schorn & Co. partnership in 1981 as the office manager and was continuously so employed after the partnership was converted to an LLC. As the office manager, Ciolino was responsible for compiling the information used to prepare the LLC's cash receipts and tax returns. Ciolino testified that Daniel never objected to any distributions he received after January 14, 2004 or to any of the tax returns prepared after that date.

¶ 71 Ripoli testified that the parties' readjustment of the income side of the capital accounts was intended to be permanent.

¶ 72 Defendants did not offer any countering expert testimony regarding the calculation of the participating percentages under the operating agreement and the January 14, 2004 agreement.

¶ 73 At the close of trial the defendants filed a motion for directed finding on counts II, III. IV and V of the first amended complaint. The court entered an order on July 13, 2011. The court denied defendant's motion for a directed finding on count II, finding that there was conflicting evidence about Daniel's consent to a reduction in his participating percentage. It granted defendants' motion for a directed finding in their favor on count III, for rescission of documents, since Daniel signed the documents and since the court had previously granted defendants' summary judgment on this count and the estate's allegations did not change in their subsequent amended verified complaint. The court granted defendants' motion for directed finding on count IV, for an accounting, of plaintiff's amended complaint, finding that the estate failed to demonstrate to the court what, if any, documents the estate needed other than those already discovered to determine the issues in the case, and it granted defendant's motion for directed finding on count V of plaintiffs' amended complaint because Daniel was receiving more than his

clients contribution to the LLC, so the estate failed to prove lack of consideration. The estate's motion for a directed finding on count II of defendants' counterclaim was granted with no objection by defense counsel as no evidence was presented regarding the claim in count II of the counterclaim.

¶ 74 The estate filed a post trial motion to reconsider the portion of the order entered on July 13, 2011 entering judgment in favor of defendants on count V.

¶ 75 On February 2, 2012, the court issued a memorandum opinion and judgment in defendants' favor on counts I, III, IV and V, in the estate's favor on count II, and finding count VI moot. The court found in favor of the estate on both count I and II of the defendants' counter claim.

¶ 76 Regarding count I, the court found that the estate failed to establish a claim for breach of contract under the previous buy-sell agreement under the partnership because the partnership was legally converted to an LLC as a matter of law under the Illinois Limited Liability Company Act and the conversion did not fail as the estate argued.

¶ 77 The court entered judgment in favor of the estate and against defendants, however, on count II for declaratory judgment regarding the participation percentages of the members, finding that the January 14, 2004 agreement was enforceable for the year 2004 but did not apply prospectively to 2005 and 2006. The trial court concluded that under the January 14, 2004 agreement the members had agreed to change the participating percentages for allocating income for 2003 and 2004, but not beyond 2004. The court found that the January 14, 2004 agreement did not mention the years 2005 and 2006. The court awarded the estate $142,967, the amount that was owed to Daniel for 2005 and 2006 under the percentages of the original operating

agreement. We note that the defendants in their appeal challenge the calculation of the amount of damages, however, as will be seen, it is unnecessary for us to dwell on that here.

¶ 78 Defendants moved for reconsideration, arguing that the members' post-agreement conduct made clear that the changes effected in the January 14, 2004 agreement were permanent and that the members' intent to rectify the imbalances in their capital accounts would not be accomplished if the agreement applied only temporarily for 2004, as determined by the court. The court denied defendants' motion for reconsideration. The court granted the estate's request for prejudgment interest and costs, totaling $36,122.75, but denied the estate an increase in the award in the amount of $101,351.17 with prejudgment interest, for distributions on death representing life insurance proceeds and post-death collections on accounts receivable allegedly owed to Daniel.

¶ 79 Defendants filed a post-trial motion to reconsider arguing 1) the court's finding on count II that the January 14, 2004 agreement did not result in a permanent change in the participating percentages, was 2) against the manifest weight of the evidence, and 3) the monetary judgment awarded was inconsistent with its finding. In the alternative, defendants requested the court modify the judgment on count II to apply it only to the LLC and not against the individual defendants because the individual defendants have no personal liability as members of the LLC by virtue of the Illinois Limited Liability Act.

¶ 80 On July 12, 2012, the trial court entered its final post-judgment order. The trial court granted the estate's post-trial motion to modify the judgment to include pre-judgment interest and costs but denied the motion to modify the judgment to include post-death distributions to Daniel. The trial court denied defendants' motion to reconsider its entry of judgment on count II, but granted the motion to reconsider on the issue of Ripoli's and Grieco's personal liability. The

judgment was amended to include pre-judgment interest in the amount of $35,741.75 and costs in the amount of $381, for a total monetary judgment of $179,089.75.

¶ 81 The LLC appealed, and the estate cross-appealed against the individual defendants Ripoli and Grieco, as well as the LLC.

¶ 82 The LLC filed an emergency motion to, in part, stay enforcement of the judgment. On August 10, 2012, the trial court entered an order staying enforcement of the judgment pursuant to Illinois Supreme Court Rule 305 (eff. July 1, 2004). The trial court entered another order, also on August 10, 2012, on stipulation of the parties, that the money held in trust by the successor trustee under the "Arnold N. Schorn Company Insurance Trust Agreement" shall be held in trust for the benefit of the Daniel estate pursuant to Illinois Supreme Court Rule 305 (eff. July 1, 2004) and will not be distributed until further order or resolution of this appeal in favor of the estate.

¶ 83 ANALYSIS

¶ 84 I. Jurisdiction

¶ 85 The question of jurisdiction is not an issue following the Supreme Court's supervisory order. We consider the date indicated by the file stamp on the notice of appeal as the date the notice of appeal was filed. The notice of appeal was filed within 30 days of the court's final post-judgment order disposing of all post-judgment motions and is timely. We have jurisdiction, and will consider the case on its merits.

¶ 86 II. Standard of Review

¶ 87 As a preliminary matter, the parties dispute which standard of review applies to this appeal. Defendants assert that this case presents purely a question of contract interpretation, which is reviewed *de novo*. The estate argues that because the trial court heard extrinsic

testimony and allowed the introduction of extrinsic documentary evidence, the standard of review should be manifest weight of the evidence.

¶ 88 The manifest weight of the evidence standard applies only if the contract terms are ambiguous and extrinsic evidence is necessary to determine the parties' intent. The parties both cite to *Bradley Real Estate Trust v. Dolan Associates Limited*, 266 Ill. App. 3d 709 (1994). "Where ambiguity exists, the trial court's determination of the intent of the parties must not be disturbed on review unless it is contrary to the manifest weight of the evidence." *Bradley Real Estate Trust*, 266 Ill. App. 3d at 712. Conversely, '[i]f the terms of the alleged contract are unambiguous, then the intent of the parties must be ascertained solely from the words used and is a question of law." *Id.* The interpretation of contracts generally is subject to a *de novo* standard of review and any factual findings that inform the interpretation are given deference on review and are reversed only where they are against the manifest weight of the evidence. *Asset Recovery Contracting, LLC v. Walsh Construction Co. of Illinois*, 2012 IL App (1st) 101226, ¶ 74 (citing *International Supply Co. v. Campbell*, 391 Ill. App. 3d 439, 447 (2009)). Where the trial court has determined the construction of a contract solely as a matter of law, however, this court's standard of review is *de novo*. *Pennsylvania Life Insurance Co. v. Pavlick*, 265 Ill. App. 3d 526, 529 (1994).

¶ 89 Any issue concerning the construction, interpretation, or legal effect of a contract is a matter to be determined by the court as a question of law and is subject to *de novo* review on appeal in accordance with the general rules applicable to contract law. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 129 (2005); *Richard W. McCarthy Trust v. Illinois Casualty Co.*, 408 Ill. App. 3d 526, 534-35 (2011). "Since construction of a contract presents an issue of law in the absence of any material questions of fact, the reviewing court may

independently construe the contract [citation] unrestrained by the trial court's judgment [citation]." *Ancraft Products Co. v. Universal Oil Products Co.*, 100 Ill. App. 3d 694, 697-98 (1981).

¶ 90 Although the trial court heard extrinsic evidence, it relied solely on its interpretation of the January 14, 2004 agreement in its opinion and judgment. The court did not refer to any of the extrinsic evidence in its memorandum opinion and judgment concerning count II and the interpretation of the January 14, 2004 agreement and its effect on the parties' participating percentages in the LLC. We also note that although the trial court heard extrinsic evidence, that evidence remained undisputed by the estate, and the estate did not include any admissibility of evidence issue in its notice of cross-appeal nor as an argument in its cross-appeal brief. Thus, the facts are not in dispute. We further find that the terms of the January 14, 2004 agreement are unambiguous and do not necessitate resort to the extrinsic evidence that was admitted at trial. We therefore apply the *de novo* standard of review.

¶ 91 III. Merits of the Appeal

¶ 92 Defendants argue that the undisputed evidence at trial was that the January 14, 2004 agreement resulted in a permanent change to Daniel's participating percentage under the operating agreement to rectify past imbalances. According to defendants, the trial court incorrectly interpreted the contract because of a "fundamental misunderstanding" about how capital accounts work. Defendants ask us to vacate the judgment in favor of the Daniel estate and instead award them $110,515 the amount allegedly owed by Daniel under the revised agreement. According to defendants, because a capital account is a "running score card," it "makes no sense for the members to have changed their participating percentages only temporarily because doing so would not correct the capital imbalances that had accrued and motivated the changes in the

first place." Defendants maintain that under the trial court's interpretation of the agreement, Daniel's "windfall" would be reinstated going forward, which is an "absurd result." Defendants further argue that the conduct of the parties demonstrates that the percentage changes in the January 14, 2004 agreement were intended to be permanent, as Daniel did not at any time object, and Daniel's own memo to Ripoli and Grieco proposed another compensation policy and did not claim an entitlement to the original operating agreement percentages.

¶ 93 The estate, meanwhile, argues in response and in its cross-appeal that Ripoli and Grieco violated Daniel's rights, and that their actions were unauthorized and in violation of both the operating agreement and section 15-20 of the Illinois Limited Liability Company Act (805 ILCS 180/15-20 (West 1998)). According to the estate, pursuant to section 20.2 of article XX of the operating agreement, the participating percentage of a member could not be reduced without that member's consent, and Daniel only consented to a reduction of his percentage for the year 2003, in the January 14, 2004 agreement Daniel signed. The estate maintains that Daniel did not consent to a reduction in his participating percentage for the years 2004, 2005, and 2006, but his percentage for these years was reduced nevertheless. The estate thus argues that the damage award to Daniel's estate was proper; as it was based on the amount owed the estate resulting from the unauthorized reduction in Daniel's participating percentage for 2005 and 2006.

¶ 94 The trial court concluded that the January 14, 2004 agreement did not permanently change the members' participating percentages because "nowhere in the document does it make clear that it is intended to apply to future years" and, therefore, it "was not intended to have prospective application." The trial court noted that the January 14, 2004 agreement "identifies particular dates to which it applies, 2003 and 2004 in particular. It quantifies how the capital

account balances will be restated as of January 1, 2003, which then appears to be used as a basis to allocate Mr. Daniel[']s income for 2004."

¶ 95 If the terms of a contract are unambiguous, we ascertain the parties' intent solely from the words of the contract itself. *Bradley Real Estate Trust v. Dolan Associates, Ltd.*, 266 Ill. App. 3d 709, 712 (1994). "Provisions as to the duration of a contract are to be construed to effectuate the intention of the parties as evidenced by the language employed." *Illinois-American Water Co. v. City of Peoria*, 332 Ill. App. 3d 1098, 1103 (2002). "A contract is not ambiguous merely because the parties disagree on its meaning; ambiguity exists where language is obscure in meaning through indefiniteness of expression." *The Reserve at Woodstock, LLC v. City of Woodstock*, 2011 IL App (2d) 100676, ¶ 39.

¶ 96 Factually, the court's finding that the January 14, 2004 agreement was limited in duration and did not effect a permanent change in the parties' participating percentages was legally erroneous. While the contract was silent regarding any limited duration, its terms describe a permanent change. The agreement provided for a restatement of Daniel's capital account, for a change in the participating percentages for the members going forward and a method for calculating draws for Daniels for 2004. The fact that the agreement included a calculation for Daniel's participating percentage for 2004 does not limit the agreement's duration. Paragraph 1 of the agreement states the general terms, specifically stating that the capital accounts were to be restated as of "1/1/03 based upon a ratio of cash receipts per partner clients to total cash receipts applied to net income for the year." This established the formula for determining capital accounts. Paragraph 2 sets out the actual calculation of the profit and loss allocations for 2003. Paragraph 3 sets out the specific calculation formula for 2004. Paragraph 4 explains the

carryover from month to month, and has no beginning or end date, thereby making it a general agreement.

¶ 97 The estate argues that Daniel did not consent to reduce his participating percentage for the years 2004, 2005, and 2006 under the January 14, 2004 agreement, but it is undisputed that Daniel signed the January 14, 2004 agreement. Under the Act, an amendment of an LLC operating agreement requires the consent of all the members (805 ILCS 180/15-5(c)(1) (West 2004)), and here all the members in fact consented. Thus, the January 14, 2004 agreement effectively amended the operating agreement. Indeed, the January 14, 2004 agreement is captioned, "Changes to the Operating Agreement." Further, the agreement specifically discusses the "Monthly contributory expenses $8,333. This is to be carried over month to month.****If amount collected is less than $8,333, the excess of that $8,333 less amount collected is carried over to the following month. No draw will be taken for that month. In the subsequent month the $8,333 plus carried over amount needs to be collected before the draw is paid." The language indicates an on-going change in the operating agreement, because it would make no sense if the carryover was intended to end at Dec. 31, 2004 and leave a dangling amount that could never be calculated, collected or distributed.

¶ 98 The estate also argues that the reduction was an "unauthorized act" because the reduction in Daniel's participating percentage was not "on behalf of the Company" as required under section 15.4 of the operating agreement. But the evidence established that the change was required to keep the LLC from dissolving.

¶ 99 Moreover, the modification of a contract may be ratified by acquiescence in a course of conduct consistent with the existence of that modification. See *Corrugated Metals, Inc. v. Industrial Comm'n*, 184 Ill. App. 3d 549, 556 (1989). Daniel's conduct indicates he acquiesced in

the changed percentage and continued to acquiesce and receive reduced distributions until his death. Daniel's November 11, 2004 memorandum, written after the January 14, 2004 agreement, indicates that it also was his understanding that that the January 14, 2004 agreement permanently changed his participating percentage. Although he indicated that he believed the agreement was only to change his percentage for 2003 and 2004, Daniel also asserts "that nothing has been signed for 2004" when the January 14, 2004 agreement on its face details the calculations for 2004 and was signed by Daniel. Displeased with his changed compensation, Daniel's memo proposed an increase. However, Daniel did not claim that he was entitled to his original participating percentage, or propose an alternative participating percentage framework. Daniel continued to receive, and accept, the reduced salary until his death. There was no action taken on his memo, he did not call a meeting, he did not disassociate from the LLC, and no other members agreed to his proposed modifications. As Nancy Ciolino, the office manager, testified, Daniel never objected to any distributions he received after January 14, 2004 or to any of the tax returns prepared after that date. While Daniel sought an increase in his monthly pay from $500 to $1000, he did not specifically object to the *percentage calculation* in the January 14, 2004 document because his request was not supported by any new suggested formula. There was no evidence that Daniel specifically objected to the changed *percentages,* and Daniel never brought an action for breach of the operating agreement

¶ 100 Therefore we find that the terms of the January 14, 2004 agreement amended the operating agreement and established a permanent change in Daniel's capital account and participating percentage. The court erred in entering judgment in favor of the estate on count II of its complaint and entering judgment against defendants on their cross-complaint. We reverse the judgment and damage award entered in favor of the estate on count II.

¶ 101 The LLC asks us to not only vacate the judgment in favor of the Daniel estate but to also enter an award in its favor on its counterclaim for $110,515, the amount allegedly owed by Daniel as the negative balance for his capital account under the revised agreement. The LLC includes only two sentences in its brief on appeal, and one sentence in its conclusion. The LLC claims that the uncontradicted testimony at trial by plaintiff's expert demonstrated that Daniel owed $110,515 to the LLC at the time of his death and that we should therefore enter judgment in favor of the LLC for this amount. But, the LLC cites to no authority in support of this bare contention. "[I]t is well settled that a contention that is supported by some argument but does not cite any authority does not satisfy the requirements of Supreme Court Rule 341(h)(7), and bare contentions that fail to cite any authority do not merit consideration on appeal." *In re Marriage of Johnson*, 2011 IL App (1st) 102826, ¶ 25 (citing *Wasleff v. Dever*, 194 Ill. App. 3d. 147, 155-56 (1990).

¶ 102 While the estate's own expert testified that if the conversion to the LLC was effective and if the January 14, 2004 agreement controlled permanently Daniel had a negative ($110,515) capital account when he died, we find that the LLC has entirely waived any argument that it is entitled to damages from the estate and we affirm the entry of judgment against the LLC on both counts of its counterclaim.

¶ 103 IV. Merits of the Cross-Appeal

¶ 104 The estate cross-appeals not only the February 2, 2012 memorandum opinion and judgment but also the order of July 12, 2012 denying their post-judgment motion, seeking reversal of those portions of the July 12, 2012 order finding that individual defendants Ripoli and Grieco have no individual personal liability and denying the estate's post-trial motion to modify the judgment to include Daniel's post-death distributions.

¶ 105 A. Ripoli and Grieco Individual Liability

¶ 106 The estate argues that the court erred in determining that Ripoli and Grieco have no individual liability for breach of contract under count I and erred in granting the defendants' post-judgment motion to modify the judgment to reflect entry of judgment against only the LLC and not the individual defendants. It is within the trial court's discretion whether to grant or deny a motion for rehearing, retrial, modification of judgment, to vacate judgment, or for other relief. *Langone v. Schad, Diamond & Shedden, P.C.*, 406 Ill. App. 3d 820, 830 (2010).

¶ 107 The estate first argues that defendants waived this issue by not raising the alleged lack of standing as an affirmative defense in their answer and also by not raising it as an affirmative defense in a motion to dismiss. " '[L]ack of standing in a civil case is an affirmative defense, which will be waived if not raised in a timely fashion in the trial court.' " *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 6 (2010) (quoting *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 508 (1988)). But modifications of judgment within 30 days of judgment in non-jury cases are expressly allowed by section 2-1203 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-1203(a) (West 2012). Defendants, therefore, did timely raise the issue of the estate's lack of standing to sue the individual defendants.

¶ 108 Motions to modify a judgment are "addressed to the trial court's discretion and its purpose is to alert the court to errors it has committed and to afford the court an opportunity to correct those errors." *Federal Kemper Life Assurance Co. v. Eichwedel,* 266 Ill. App. 3d 88, 98 (1994) (citing *In re Marriage of Sarron,* 247 Ill. App. 3d 819, 823 (1993)). " 'Whether a trial court has abused its discretion turns on whether the court's refusal to vacate "violates the moving party's right to fundamental justice and manifests an improper application of discretion." ' " *Federal Kemper Life Assurance Co.,* 266 Ill. App. 3d at 98-99 (quoting *Mryszuk v. Hoyos,* 228

Ill. App. 3d 860, 863 (1992), quoting *Harris v. Harris,* 45 Ill. App. 3d 820, 821 (1977)). The trial court correctly exercised its discretion because, by law, the individual defendants cannot be held liable.

¶ 109 The Limited Liability Company Act was amended, effective January 1, 1998, from previously allowing personal liability of LLC members to the same extent as shareholders in a corporation to expressly barring any personal liability. (See Pub. Act 90-424 (eff. Jan. 1, 1998)). Under section 10-10(a) of the Act, members of an LLC have no personal liability:

> "(a) Except as otherwise provided in subsection (d) of this Section, the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager." 805 ILCS 180/10-10(a) (West 1998).

¶ 110 Section 10-10(a) has remained unchanged since this amendment. 805 ILCS 180/10-10(a) (West 2012). This provision was in effect from the date the partnership was converted to an LLC and has been in effect throughout the duration of this case.

¶ 111 Subsection (d) of section 10-10 provides:

> "(d) All or specified members of a limited liability company are liable in their capacity as members for all or specified debts, obligations, or liabilities of the company if:
>
> (1) a provision to that effect is contained in the articles of organization; and
>
> (2) a member so liable has consented in writing to the adoption of the provision or to be bound by the provision." 805 ILCS 180/10-10(d) (West 1998).

¶ 112 The legislature removed the provision that allowed a member or manager of an LLC to be held personally liable similar to the Business Corporation Act. "Thus, the Act does not provide for a member or manager's personal liability to a third party for an LLC's debts and liabilities, and no rule of construction authorizes this court to declare that the legislature did not mean what the plain language of the statute imports." *Puleo v. Topel*, 368 Ill. App. 3d 63, 70 (2006) (citing *Solich v. George & Anna Portes Cancer Prevention Center of Chicago, Inc.*, 158 Ill. 2d 76, 83 (1994)).

¶ 113 The estate also cannot establish the exception under subsection (d), because there is no provision in the LLC's articles of organization or any other agreement between the members that allows for individual liability of the members to a third party. In fact, the Operating Agreement includes specific language to this effect: "[Section] 14.1. Limitation of Member Liability. The Members shall have no personal liability whatever, whether to the Company, to any of the Members or to the creditors of the Company, for the debts of the Company or any of its losses."

¶ 114 In an attempt to avoid the bar of section 10-10, the estate argues that the conversion of the partnership to an LLC "failed" because the LLC members continued to treat certain aspects of the business as a partnership. But the fact that the LLC members continued to treat aspects of the business as a partnership (for instance, filing K-1 partnership tax return statements) does not change the legal status of the business as an LLC. Section 10-10(c) of the Act specifically provides that any inconsistent actions by LLC members does not affect the legal status of the LLC and cannot be a ground for imposing personal liability:

> "(c) The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management

of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company." 805 ILCS 180/10-10(c) (West 1998).

¶ 115 Subsection (c) was added by the 1998 amendment to the Act and has been in effect unchanged since then (See Pub. Act 90-424 (eff. Jan. 1, 1998)). 805 ILCS 180/10-10(c) (West 2012). The trial court correctly exercised its discretion in granting defendants' motion to amend the judgment.

¶ 116 The estate also maintains that Ripoli and Grieco are individually liable because the conversion from a partnership to an LLC failed. We find the estate's argument on this point is without merit.

¶ 117 On December 31, 1998, Ripoli and Daniel, the only members of the original partnership, filed a statement of conversion and articles of organization with the Illinois Secretary of State. This effectively converted the partnership into a limited liability company. Then Grieco joined the newly formed LLC in 1999.

¶ 118 The statement of conversion specifically stated that "[e]ach partner voted for the conversion," which satisfied the statutory requirement that all partners approve a conversion. 805 ILCS 180/37-10(b) (West 1998). Doing so creates a presumption that all prerequisites to formation have been satisfied. 805 ILCS 180/5-40(a) (West 1998). Under section 5-40 of the Illinois Limited Liability Company Act, "[u]pon the filing of the articles of organization by the Secretary of State, the limited liability company's existence shall begin." 805 ILCS 180/5-40(a) (West 1998).

¶ 119 The estate argues that the conversion to an LLC failed because the partnership assets did not vest in the LLC. This argument is entirely refuted by the Act. Under section 37-15(b) of the Act, the entity essentially remains unchanged and "is for all purposes the same entity that existed

before the conversion." 805 ILCS 180/37-15(a) (West 1998). The assets do not need to be transferred to vest in the newly formed LLC. Section 37-15 of the Illinois Limited Liability Company Act provides that all assets of the partnership automatically become assets of the LLC upon conversion:

> “(b) When a conversion takes effect:
>
> (1) all property owned by the converting partnership or limited partnership vests in the limited liability company;
>
> (2) all debts, liabilities, and other obligations of the converting partnership or limited partnership continue as obligations of the limited liability company;
>
> (3) an action or proceeding pending by or against the converting partnership or limited partnership may be continued as if the conversion had not occurred;
>
> (4) except as prohibited by other law, all of the rights, privileges, immunities, powers, and purposes of the converting partnership or limited partnership vest in the limited liability company; and
>
> (5) except as otherwise provided in the agreement of conversion under Section 37-10, all of the partners of the converting partnership continue as members of the limited liability company." 805 ILCS 180/37-15(b) (West 1998).

¶ 120 The estate argues that the court incorrectly relied on section 10-10 when section 15-20 of the Act allows actions by a member against other members of an LLC to enforce the member's rights under the operating agreement. Section 15-20 provides, in relevant part:

> “(a) A member may maintain an action against a limited liability company or another member for legal or equitable relief, with or without an accounting as to the company's business, to enforce all of the following:

(1) The member’s rights under the operating agreement.

(2) The member’s rights under this Act.

(3) The rights and otherwise protect the interests of the member, including rights and interests arising independently of the member’s relationship to the company.” 805 ILCS 180/15-20(a) (West 2012).

¶ 121 Here, however, the claims against the LLC and Ripoli and Grieco were brought by Daniel's estate, not by Daniel. Section 15-20(a) expressly provides only for an action by a "member." It does not also allow for actions by the member's representatives, agents, or a member's estate. The plain language of section 15-20(a) of the Act is expressly limited to only members. In the event of an individual member's death, the member becomes disassociated from the LLC. See 805 ILCS 180/35-45(8)(A) (West 1998). The estate cites to no authority allowing actions against individual members of an LLC by a member's estate. In its cross-appeal, as the appellant on this claim of error the estate must provide this court with authority to support its claim of error, and the failure to do so renders the argument forfeited. See Ill. Sup. Ct. R. 341(e)(7) (eff. Apr. 11, 2001); *Chicagoland Chamber of Commerce v. Pappas*, 378 Ill. App. 3d 334, 364 (2007). The estate has provided no authority that an estate can maintain an action against individual LLC members. As such, the estate has forfeited its argument that it could properly maintain an action against the individual defendants and obtain a judgment against them.

¶ 122 Notwithstanding the convoluted and unexplained circumstances of the books, records, and tax returns, it is uncontradicted that on January 1, 1999 the former partnership, Arnold Schorn & Company, was effectively and legally converted to Arnold Schorn & Company, LLC. From that point on, as a matter of law, the only entity that existed was the LLC. There is no

evidence that after the LLC conversion a subsequent new partnership was created, that a new partnership agreement was signed, that meetings were held for a new partnership or that a new partnership was registered with the Clerk of the county. Under the Act, once the partnership was converted to an LLC and the articles of organization were filed with the Illinois Secretary of State, it legally became an LLC (805 ILCS 180/37-10 (West 2012) and no inconsistent actions of the members can change this legal fact. Members of an LLC have no individual liability to nonmembers absent a specific provision in the articles of organization. (805 ILCS 180/10-10 (a) and (d))(West 2012).The Act is clear on these points. The court did not abuse its discretion in modifying the judgment on Count II to reflect judgment against only the LLC and not the individual defendants Ripoli and Grieco. We affirm the court's ruling on this issue.

¶ 123 B. Post-Death Distributions to Daniel

¶ 124 The estate further argues that the court erred in denying its motion to modify the judgment to include distributions on Daniel's death, which include $50,000 in life insurance proceeds and the post-death collection of accounts receivable. As noted, the disposition of a motion to amend a judgment is reviewed for abuse of discretion. See *Federal Kemper Life Assurance Co.*, 266 Ill. App. 3d at 98. We hold the trial court did not abuse its discretion in refusing to include distributions on death in its order.

¶ 125 Section 9.5 of the LLC operating agreement provided for distributions on death, but the addendum to that operating agreement dated October 6, 1999, provided that there would be no distribution on death unless and until a preexisting loan from American National Bank was paid. The addendum specifically provided: "After each former partner and now member's estate has finally paid its share (50%) of the bank loan, Section 9.5 will apply as to the remaining collections on outstanding receivables at the date of death ***."

¶ 126 The estate argues that defendants waived the issue of this "condition precedent" to the post-death distributions, but this was one of the estate's counterclaims, on which it had the burden of proof. Regardless of whether defendants raised any defense on this issue, the estate had the burden of proof.

¶ 127 The trial court found that the estate did not provide evidence establishing that this loan or any loan was repaid. This finding is not against the manifest weight of the evidence. The estate relies on Ryan's testimony that he reduced Daniel's capital account by $1,458, which was half of the balance of the loan. The estate thus interprets the provision in the addendum to mean that once either individual member pays its share (half) of the bank loan, then section 9.5 would apply and allow distributions on death. The addendum, however, requires "each former partner and now member's estate" to pay its share of the loan before section 9.5 would apply. The estate itself argues in its brief on appeal that "[i]t is clear from the language of the Addendum [October 6, 1999 Addendum to Operating Agreement] itself that the *requirement that the Note be paid in full* before any distributions on death were made was intended to benefit both Mr. Daniel and Ripoli, upon the death of the first to die." (Emphasis added.) Thus, the estate recognizes that the addendum in fact required that the entire loan be repaid before section 9.5 would apply.

¶ 128 Even assuming as true that Daniel repaid his share of the loan, there was no evidence that Ripoli paid his share. Further, Ripoli sought reimbursement in the counterclaim from the estate for $1,000, which he, not Daniel, paid for Daniel's share of the loan. Although the estate maintains on appeal that there was "substantial, reliable and uncontroverted evidence" that the loan was repaid, from our review of the evidence at trial, there was no evidence that this loan was in fact repaid. The trial court itself looked closely at this issue finding in its February 2, 2012 Order: "Hints exist in the evidence about this loan. For example, Mr. Daniel's November 2004

memorandum refers to payments he was making on a loan. Defendant's Ex. 30 refers to an 'ANB loan' in the amount of $30,000 in January 2003. There are other references to 'loans' and 'bank loans' in the Defendant's recap of cash receipts for 2004 and 2005. They do not identify the loan as the ANB loan. Consequently, Plaintiffs have not established the condition precedent for receiving a distribution on death under section 9.5." (Order, p.34) There are no "Paid" or "Cancelled" or "Closed" loans in the record. Nor does Mr. Ryan's report identify which, if any, loans he has considered. The trail court's findings were not against the manifest weight of the evidence, and we therefore affirm the portion of the order of July 12, 2012 denying the estate's motion to modify the judgment to include the distribution upon death.

¶ 129 C. Insurance Trust Proceeds

¶ 130 As to the proceeds from the insurance policy, we note that neither the policies nor the payment history(ies) are in the record. The record does include at letter from Mark Wetterquist, the successor trustee under the Buy Sell Agreement, stating that the trust collected insurance proceeds from MetLife on the life of Daniel in the amount of $67,451.01 and attached a copy of a check made out to the Estate of Benjamin Daniel in that amount based on the "Buy Sell Agreement Dated 12/31/76." The insurance proceeds are the corpus of the Insurance Trust and an asset of the Insurance Trust. The trial court entered a stipulated order that the proceeds of the Trust would be held until the conclusion of this appeal. In their Petition for Rehearing the estate argues that these funds were not the subject of any condition precedent because of the partnership's Buy-Sell agreement. However, since we have found that the conversion from the partnership to the LLC was effective, the partnership's Buy-Sell agreement is no longer in effect and does not control the distribution of the insurance proceeds. Those funds are controlled only by the LLC Operating Agreement 9.5 and the subsequent amendment to 9.5. The LLC

Operating Agreement requires that "the life insurance collected by the LLC on the life of the deceased member (the premiums of which have been paid by the deceased member) shall be immediately distributed to the surviving spouse or estate of the deceased member." However, the October 6, 1999 Addendum requires that the loan be fully repaid before there is any distribution on death including "All collections received from life insurance and the deceased partner's share of accounts receivable…" Since the estate has not established that the loan was fully repaid and has not established that Daniels paid the premiums on the insurance policy(ies) we agree with the trial court that the estate has not provided sufficient information to prevail on this issue. However, since the trial court entered an order putting the proceeds of the insurance trust on hold while waiting for the disposition of this appeal we remand for the trial court to make findings regarding the insurance policy(ies) and enter a final order regarding the money held in trust pursuant to Illinois Supreme Court Rule 305 (eff. July 1, 2004).

¶ 131 CONCLUSION

¶ 132 Affirmed in part and reversed in part and remanded with direction.